IN THE SUPREME COURT OF THE STATE OF DELAWARE

CYRIL D. McCRAY,	§	
	§	No. 469, 2010
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0909007381
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 19, 2011
Decided: February 11, 2011

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

O R D E R

This 11th day of February 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Cyril D. McCray ("McCray"), the defendant-below, appeals from Superior Court final judgments convicting him of Possession With Intent to Deliver ("PWID") Cocaine,[1] Maintaining a Dwelling for Keeping Controlled Substances,[2] Possession of Drug Paraphernalia,[3] and Tampering With Physical

[1] 16 *Del. C.* § 4751(a).

[2] 16 *Del. C.* § 4755(a)(5).

[3] 16 *Del. C.* § 4771.

Evidence,[4] and from the denial of his Motion for Judgment of Acquittal on the tampering charge. On appeal, McCray claims that the trial court erred by: (i) admitting testimony about departmental "buy money" that was in his possession, which should have been excluded as evidence of a prior bad act; and (ii) denying his acquittal motion, because although he had attempted to conceal and/or destroy evidence, that attempt was never completed. We find no error and affirm.

2. On September 9, 2009, between ten and fifteen officers from the Wilmington Police drug unit executed a daytime search warrant of 402 West 7th Street, Apartment 2, in Wilmington, Delaware. The police first knocked on the apartment's front door and announced themselves. After waiting for 10 seconds without a response, the officers broke down the door and entered the apartment.

3. Upon entering, the police saw a man (later identified as Mannix Desmuke) running from the living room towards the back of the apartment. They also found two other persons in the apartment's rear bedroom, and a fourth person hiding in a closet. Officers observed the defendant, McCray, exiting the bathroom. The police searched McCray and found $191 in his pockets, of which $10 was later determined to be departmental "buy money."[5]

[4] 11 *Del. C.* § 1269(2).

[5] "Buy money" is money that the State gives confidential informants who are helping investigations to use to purchase items, such as drugs, during a controlled buy. Here, the police had given their confidential informant the "buy money" to conduct several controlled buys.

4. When Detective Raymond Mullin entered the bathroom that McCray had just left, he found, on the bathroom sink, a kitchen plate with a small amount of white residue on top of it. Mullin also noticed that the toilet was running "as if it had just been flushed."[6] Although Mullin saw nothing in the toilet bowl, he suspected that McCray might have tried to flush contraband down the toilet.[7] Mullin broke open the toilet and extracted a razor blade and a clear plastic sandwich bag that had gotten wedged between the toilet bowl and the water pipe.[8] The plastic bag contained a small white object that field-tested positive for crack cocaine.

5. The police also searched two couches located in the living room. In the first, they found several plastic bags with knotted corners. Each knotted corner contained a piece of a white chunky substance (for a total of 68 pieces) that field-tested positive for crack cocaine.[9] Behind the first couch where the crack cocaine was found, the police also found a small digital scale. The police later weighed the 69 pieces of crack cocaine (68 pieces found in the couch plus the piece found in

[6] Mullin described that he heard a hissing noise, and observed that the water in the toilet bowl was still refilling. Mullin did not actually hear or see the toilet flush.

[7] For example, crack cocaine will dissolve when put in contact with water.

[8] Mullin testified that the police "basically broke the toilet."

[9] The purpose of using knotted corners was to pre-package a preset amount of crack cocaine for sale. Thus, a seller could simply cut off a corner of the bag to sell to a customer without having to weigh it during the transaction.

the toilet), and determined that the total weight was 6.9 grams. Each knotted corner held approximately $10 worth of crack cocaine. In the second couch, the police recovered seven knotted plastic bags containing a green plant-like substance that field-tested positive for marijuana. All told, 8 grams of marijuana were found.

6. When the police arrested McCray, he gave his address as the apartment that had just been searched. The police then drove all of the apartment's occupants to the police station. McCray was charged with PWID Cocaine, PWID Marijuana,[10] Maintaining a Dwelling for Keeping Controlled Substances, Possession of Drug Paraphernalia, and Tampering With Physical Evidence.

7. A jury trial was held on April 8, 2010. Before jury selection began, the prosecution stated that it would not be presenting evidence of any controlled drug buys to protect the identity of their confidential informant. All the State intended to show was that McCray had been found with "buy money" on him, and to explain to the jury what "buy money" was. Defense counsel objected on the grounds that the "buy money" constituted evidence of a prior bad act that was inadmissible under Delaware Rules of Evidence ("DRE") 404(b).[11]

[10] 16 *Del. C.* § 4752A.

[11] DEL. UNIF. R. EVID. 404(b) states that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith [but may] be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

8. The trial judge concluded that because intent was an element of the PWID charges, and because the "buy money" evidence was relevant to intent, that evidence was admissible as an exception to Rule 404(b).[12] The trial judge also indicated that she would make a *Getz*[13] analysis on the record, but the record shows that she never did.[14]

9. During the trial, the State presented testimony from Detective Mullin and Detective Mark Grajewski, who was an expert in police drug investigations but had not been involved in this case. McCray chose not to testify, and defense counsel did not call any witnesses. At the conclusion of its case, the State entered a *nolle prosequi* on the PWID marijuana charge. Defense counsel then moved for a judgment of acquittal on the tampering charge, arguing that there was no completed act of tampering since the police were immediately able to retrieve the drugs placed in the toilet. The trial judge denied that motion, and the jury returned a verdict of guilty on all remaining charges. McCray was declared an habitual offender, and was sentenced as follows: for PWID Cocaine, three years at Level 5 incarceration; for Maintaining a Dwelling, three years at Level 5 incarceration; for

[12] The trial judge stated: "[T]his is a 404(b) issue, and this clearly goes to intent. . . . I mean, the intent is that [the defendant] intends to sell, and that certainly is probative, highly probative and far more probative than it is prejudicial."

[13] *Getz v. State*, 538 A.2d 726 (Del. 1988).

[14] The trial judge stated: "I'm going to do a *Getz* analysis on the record. I don't have the time to do it now because the jury's waiting."

Tampering with Physical Evidence, two years at Level 5 incarceration, suspended for decreasing amounts of probation; and for Possession of Drug Paraphernalia, twelve months at Level 5 incarceration, suspended for twelve months at Level 2 probation. McCray directly appeals.

10. On appeal, McCray claims that the Superior Court erred by: (i) allowing the State to present inadmissible "buy money" evidence, and (ii) denying his motion for acquittal on the tampering charge, because he never completed the required act of concealment or destruction. We next address those claims.

11. McCray first claims that the "buy money" evidence was inadmissible evidence of a prior bad act (namely, that McCray had previously sold drugs). He advances two arguments in support: *first*, that the trial court failed to properly conduct the required *Getz* analysis or give a limiting instruction to the jury, and *second*, that even if the "buy money" evidence was admissible, under the best evidence rule the State was required to produce the actual "buy money" at trial.

12. This Court reviews a trial court's evidentiary decisions for abuse of discretion.[15] If we find that the trial court committed error or abused its discretion,

[15] *Pope v. State*, 632 A.2d 73, 78-79 (Del. 1993).

then we must "determine whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial."[16]

13. Under DRE 404(b), evidence of other crimes is generally inadmissible to prove that the defendant committed the charged offense.[17] But (and as the trial judge correctly held), evidence of a prior bad act that is otherwise inadmissible may be admitted as an exception, if it is offered to prove something other than a propensity to commit the charged offense, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[18] *Getz* established the following guidelines for determining the admissibility of evidence under DRE 404(b):

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in this case. . . .
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive."
> (4) The other crimes must not be too remote in time from the charged offense.
> (5) The court must balance the probative values of such evidence against its unfairly prejudicial effect, as required by DRE 403.

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[16] *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987) (internal quotation marks and citation omitted).

[17] *See, e.g.*, *Getz*, 538 A.2d at 730; DEL. UNIF. R. EVID. 404(b).

[18] DEL. UNIF. R. EVID. 404(b).

> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by DRE 105.[19]

14. The record shows that the trial judge did not articulate or consider all of the *Getz* factors on the record. At best, the trial judge conducted an informal analysis before the trial began. Defense counsel, however, never objected to the trial judge's oversight. In any case, whether we review the trial judge's omission for abuse of discretion or even for plain error, the trial transcript shows that the testimony regarding McCray's possession of the "buy money" was admissible and that any error was harmless.

15. As to the first two *Getz* factors, because McCray had been charged with possession with intent to deliver cocaine, intent was an element of the charged offense and the State had the burden of proving that element. To meet that burden, the State offered the "buy money" evidence to establish that McCray had the motive and intent to sell the cocaine. That evidentiary purpose was proper under DRE 404(b). As to the third and fourth *Getz* factors, the evidence was "plain, clear and conclusive," because: (i) the money was found on McCray's person when the police searched him; and (ii) the "prior bad act" of selling the drugs that brought the "buy money" into McCray's possession was "not too remote in time," since the controlled buy took place shortly before the police obtained the search warrant to

[19] *Getz*, 538 A.2d at 734 (internal citations omitted).

search McCray's apartment.[20] As to the fifth factor, the trial judge expressly found that the evidence was "highly probative and far more probative than it is prejudicial." Finally, although the trial judge did not give the jury a limiting instruction, defense counsel did not request one when the parties considered jury instructions.[21] "[A] trial court generally does not commit plain error if it fails to give a limiting instruction, *sua sponte*, when evidence of prior bad acts is admitted."[22]

16. Even if the trial court's failure to complete a formal *Getz* analysis on the record or to issue a limiting jury instruction was error, any error was harmless. An error in admitting evidence is "harmless" where "the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction."[23] Here, even without the "buy money" testimony, the evidence was sufficient to convict McCray of the drug charges. Specifically, when the police executed the search warrant, they found: (a) in the living room, 68 bags of crack cocaine and a small digital scale; (b) in the bathroom, a plate with cocaine residue; (c) in the toilet, a

[20] To reiterate, the State did not present evidence of the controlled buy at trial because it wished to preserve the identity of its confidential informant.

[21] For example, defense counsel did request that, for the PWID cocaine charge, the trial judge instruct the jury on the lesser-included offense of simple possession.

[22] *Williams v. State*, 796 A.2d 1281, 1290 (Del. 2002).

[23] *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991) (citations omitted).

bag of crack cocaine and a razor blade. The State's expert, Detective Grajewski, testified that the quantity of the drug, the presence of the scale, and the manner of the drug's packaging was consistent with a sale rather than personal use.[24] And, the lack of any evidence of equipment for ingesting the crack cocaine, combined with the amount of cash found on McCray's person, was also consistent with a sale, not use. In short, even without the "buy money" testimony, there was sufficient evidence to support McCray's convictions.

17. McCray next claims that even if the trial court properly admitted the "buy money" testimony, the "best evidence" rule (DRE 1002) required the State to produce that money at trial. Under DRE 1002, "[t]o prove the content of a writing . . . the original writing . . . is required."[25] McCray argues that the State should have been required to produce the buy money itself, rather than have Detective Mullin testify about it.

18. McCray's reliance on this evidentiary rule is misplaced. In his testimony, Detective Mullin identified the money found on McCray as

[24] *See Hardin v. State*, 844 A.2d 982, 988 (Del. 2004) (holding that "to prove intent to deliver the State must prove something beyond possession, packaging, and quantity of drugs. Proof of this additional element may take the form of expert testimony connecting the quantity of drugs with intent to deliver."); *Morales v. State*, 696 A.2d 390, 394 (Del. 1997) (upholding defendant's conviction for possession with intent to deliver based on "expert testimony that the packaging, weight, and quantity of the heroin found in [defendant's] apartment were consistent with an intent to deal the drugs rather than to use them personally.").

[25] DEL. UNIF. R. EVID. 1002.

departmental buy money. That testimony was legally significant because it showed how McCray came into possession of that money.[26] In *Day v. State*, a police officer had written down the monetary bills' serial numbers and testified that those numbers matched with serial numbers recorded as departmental buy money.[27] We held that the "best evidence rule" did not require the State to produce the actual money at trial, because the "material point was the identification of the particular bills through the serial numbers recorded by the patrolman."[28] The "actual writings on the [] bills were immaterial."[29] That rationale applies with equal force here. The trial court correctly ruled that the State was not required to produce the buy money under the best evidence rule.[30]

19. McCray's second claim is that the trial court erroneously denied his motion for judgment of acquittal on the tampering charge. Relying on our recent

[26] *See United States v. Duffy*, 454 F.2d 809, 812 (5th Cir. 1972) (distinguishing when the best evidence rule applies to "chattel" compared to a "writing," and concluding that where "[t]he crime charged was not possession of a certain article, where the failure to produce the article might prejudice the defense," the best evidence rule does not apply).

[27] *Day v. State*, 297 A.2d 50, 50-51 (Del. 1972).

[28] *Id.* at 51.

[29] *Id.*

[30] *See, e.g., United States v. Walker*, 207 F.App'x. 673, 677 (7th Cir. 2006) (holding that in the prosecution of a defendant for conspiracy to possess cocaine with intent to distribute, the admission of a police officer's testimony regarding marked money did not violate the best evidence rule); *see also Wilson v. State*, 568 P.2d 1315, 1318 (Okla. Crim. App. 1977) (ruling that the best evidence rule was not applicable because the "bills were merely physical objects used in the commission of a crime which were capable of proof by testimony without even offering the bills into evidence.").

opinion in *Harris v. State*,[31] he argues that although he attempted to conceal and/or destroy the contraband, he never completed the required act, because the police retrieved the razor blade and bag of crack cocaine after breaking open the toilet.

20. This Court reviews a trial court's denial of a Motion for Judgment of Acquittal *de novo* to determine whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty, beyond a reasonable doubt, of the essential elements of the crime.[32] A person is guilty of Tampering with Physical Evidence when "[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent its production or use, the person suppresses it by any act of concealment, alteration, or destruction. . . ."[33]

21. In *Harris*, we identified three factors to be considered in determining whether "tampering" of an evidentiary item has occurred: (i) whether the police perceived (*i.e.*, saw or heard) the item or act of suppression;[34] (ii) whether the item was immediately retrievable, and whether the police were immediately able to do

[31] 991 A.2d 1135 (Del. 2010).

[32] *Pennewell v. State*, 977 A.2d 800, 801 (Del. 2009).

[33] 11 *Del. C.* § 1269(2).

[34] *Harris*, 991 A.2d at 1140-41.

so;[35] and (iii) whether the defendant believed that the item constituted "evidence" that was "about to be used or produced" against him in a criminal proceeding.[36] We held that the defendant (Harris), who had attempted to conceal drugs by placing a plastic bag of drugs in his mouth, was not guilty of tampering, because the police saw the plastic bag in Harris' mouth, heard the plastic bag muffling Harris' voice, and were able to "immediately retrieve" the drugs by taking the plastic bag out of Harris' mouth.[37] We held that where "the police perceive the act of concealment and could immediately retrieve the evidence, the defendant . . . failed to 'suppress' evidence under [11 *Del. C.*] § 1269."[38]

22. In *Harris*, we distinguished *Anderson v. State*[39] on the basis that in *Anderson* the police did not perceive any evidence or the act of suppression.[40] In *Anderson*, although the police recovered a purse containing a plastic bag of cocaine within a clogged toilet, they did not hear or see the defendant (Anderson) flush the

[35] *Id.* at 1138-39, 1141 (noting that a drug that had dissolved in water was not "immediately retrievable").

[36] *Id.* at 1141-42 (discussing the "procedural immediacy " requirement of a tampering charge).

[37] *Id.* at 1137, 1140.

[38] *Id.* at 1140.

[39] 846 A.2d 237, 2004 WL 744188 (Del. 2004) (TABLE).

[40] *Harris*, 991 A.2d at 1140.

drugs down the toilet.[41] Rather, they relied on the defendant's girlfriend's statement that the toilet might be clogged and the fact that Anderson's pant leg was wet. Based on that, the police investigated by disassembling the toilet.[42] Thus, *Anderson* is distinguishable from *Harris* because "[a]lthough the police officers immediately retrieved the evidence, they did not perceive Anderson's act of suppression. . . . Anderson had already completed his act of suppression without police detection."[43] Moreover, Anderson had a reasonable belief that the drugs would be used against him in a criminal proceeding, because the police had found the drugs while executing a search warrant of his house.[44]

23. This case is controlled by *Anderson*, not *Harris.* Here, like *Anderson*, the drugs were not plainly visible to the police, nor did the police perceive (see or hear) McCray flush the razor blade and cocaine down the toilet.[45] Detective Mullin testified that he did not see any drugs within the toilet bowl, nor did he see

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[41] *Anderson*, 2004 WL 744188, at *2; *see also Harris*, 991 A.2d at 1140 (distinguishing *Anderson*).

[42] *Anderson*, 2004 WL 744188, at *1-2.

[43] *Harris*, 991 A.2d at 1140.

[44] *Id.* at 1143 ("Upon entering the house, the police took constructive control of the premises named in the warrant. At that point, Anderson's belief that the State could introduce his bag of cocaine at trial was reasonable, because the police's probable cause and search made his trial procedurally imminent. That is, he acted to suppress the cocaine with a credible reason to believe that the State was 'about to' introduce it as evidence.").

[45] *See id.* at 1140 (defining "perception" as "visual, auditory, or both.").

or hear McCray flush the toilet. Rather, Mullin relied on the fact that the police had found McCray in the bathroom (where there was a plate with white residue on it), and that the water in the toilet bowl was refilling, indicating that someone had likely recently flushed the toilet. Thus, at the point when McCray flushed the toilet and the drugs were no longer visible, McCray had "completed his act of suppression without police detection." Moreover, when McCray heard the police knock on the door and announce themselves, he had a reasonable belief that the State would introduce the bag of cocaine (if found) at trial. Here, as in *Anderson*, McCray acted to suppress the cocaine "with a credible reason to believe that the State was 'about to' introduce it as evidence."[46] The trial court, therefore, did not err in denying his motion for acquittal on this basis.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED.**

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[46] *Id.* at 1143.